

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
LUSAKA

1996/HP/4554

(Divorce Jurisdiction)

BETWEEN:

LCM COMPANY LIMITED

PLAINTIFF

AND

UNITED BUS COMPANY OF ZAMBIA LIMITED
(IN LIQUIDATION)
AND

DEFENDANT

LONDON NGOMA
JOSEPH BIYELA
RICHARD NG'OMBE
FRIDAY SIMWANZA



1ST INTERVENER
2ND INTERVENER
3RD INTERVENER
4TH INTERVENER

**BEFORE THE HONOURABLE. LADY JUSTICE M. CHANDA THIS 14 DAY
OF MARCH, 2017**

APPEARANCES:

For the Plaintiff : S. Chisenga from Corpus Legal Practitioners

For the Defendant : F.N Chani from Chongo Manda & Associates

For the Interveners : D.K Kasote agent for George Kunda and Company

JUDGMENT

LEGISLATION REFERRED TO:

1. The Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia
2. Companies Act Chapter 388 of the Laws of Zambia
3. Halsbury's Laws of England 5th Edition Volume 62 at paragraph 279

CASES REFERRED TO:

1. Galunia Farms Limited v National Milling Company Limited (2004) ZR 1

2. Frank Machupa & Others v Tanzania-Zambia Railways Authority (2008) ZR 112.
3. Neale v Merret (1930) WN 189
4. Hyde v Wrench (1840) 3 Beav 334
5. Anti-Corruption Commission v Barnnet Development Corporation Limited (2008) Vol 1 ZR 69
6. Corpus Legal Practitioners v Mwanandani Holdings Limited, Appeal No. 50 of 2014
7. Mpongwe Development Corporation Limited v Francis Kamanda and 51 others, Appeal No. 137 of 2007
8. Ndongo v Moses Mulyongo and Roostico Banda (2011) Vol 1 ZR 187
9. Lusaka City Council, National Airports Corporation v Grace Mwamba and 4 Others SCZ Judgement No. 21 of 1999

By writ of summons issued on 10th June, 2002, the plaintiff, **LCM Company Limited** brought an action against the defendant, **United Bus Company of Zambia Limited**. The plaintiff's contention was that it purchased properties S/D4 and S/D5 of farm No.110a, Villa Elizabetha from the defendant and acquired title but was prevented from taking possession by the interveners herein namely **London Ngoma, Joseph Biyela, Richard Ng'ombe** and **Friday Simwanza**.

The reliefs sought by the plaintiff were as follows:-

1. A declaratory order that the plaintiff is the registered beneficial owner of properties otherwise known as S/D4 and S/D5 of farm No. 110a Villa Elizabetha situated in the Lusaka City of the Lusaka Province of Zambia
2. An order of possession of the subject properties
3. An order for payment of standard rentals by the interveners from the date title passed to the plaintiff from the 1st defendant
4. Interest at the lending commercial rate on (c) above
5. Costs

The defendant in its defence admitted that the plaintiff did purchase the said properties and obtained a certificate of title. It also stated that Messrs S.P Mulenga Associates whom the interveners were dealing with were never authorised by the liquidator to commit the defendant to sell the properties. It also stated that there was a subsequent attempt to regularise the appointment of Messrs S.P Mulenga Associates but it did not meet the terms of appointment prescribed by the liquidators and committee of inspection. It was finally stated that there was no contract of sale executed between the defendant and the interveners and that the said interveners were informed that the said properties had been sold to the plaintiff.

The matter was heard on 15th September, 2015 and all the parties were before Court. Each party called one witness.

The plaintiff's witness (**PW1**) **Chispine Lukas Mutale**, was the plaintiff's Administration Manager. He testified that the defendant had placed advertisements in print and electronic media for the sale of all its assets. PW1 asserted that the plaintiff desired to purchase four farm houses from the defendant namely; farm 4/110a, farm 4/110b, farm 5/110a and farm 5/110b in Villa Elizabetha, Lusaka and on 16th February, 1996 wrote a letter of offer. On 20th February, 1996, the plaintiff received a tender to purchase the four houses at the sum of K144,000,000 as shown on page 4 of the plaintiff's supplementary bundle of documents. The witness then inspected the houses with the

defendant's liquidator and found that the interveners were occupying them. When PW1 inquired concerning their occupancy, the liquidator explained that the interveners were the first to be offered to purchase the houses and were given a period of 30 days within which to indicate whether they would purchase them. He stated that they however did not respond and the plaintiff proceeded to pay the purchase sum to the defendant.

The witness explained that payment by the plaintiff was made via cheques in two instalments of K90,000,000 and K54,000,000. He stated that the plaintiff paid the second instalment to a law firm by the name of Musonda and Company which firm was representing both parties in the sale transaction. PW1 said the firm issued the plaintiff with a receipt acknowledging payment and the parties signed a contract of sale and executed an assignment. PW1 explained that the plaintiff obtained title deeds to the houses and occupied them from 26th December, 1997 until three years later when it was evicted by a law firm called Mwanawasa and Company. When that happened, the interveners occupied the houses. He explained that they had done so without payment of any rent to the plaintiff and went on to place a caveat on the said properties.

In cross-examination PW1 stated that the plaintiff company was offered to purchase four houses by the defendant and that they signed a contract of sale, prepared by M. Musonda and Company. When referred to page 4 of the plaintiff's supplementary bundle of documents, PW1 told the Court that there were three properties

described as S/D4 of farm 110a , S/D5 of farm 110a and S/D67 of farm 284a.

PW1 stated that an initial payment of K90,000,000 was made to the then liquidator of the defendant company, Rogers Sombe and a receipt was duly issued for the payment. He further stated that the balance of K54,000,000 was paid to M. Musonda and company as they represented both parties in the conveyancing transaction.

PW1 stated that the liquidator took him and four other persons to view the houses on 15th February, 1996. He stated that during the said inspections they found the tenants who were notified by the liquidator that the plaintiff was buying the properties.

He also stated that the plaintiff was informed that the tenants were sitting tenants who had been given the first option to purchase the houses and they were given 30 days to pay or to show ability to pay. He further stated that he was never informed about the 10% that had been paid by the tenants to a private liquidator.

The intervener's counsel asked PW1 what the letters LCM stood for and his response was that they represented the initials of his names. The witness explained that the plaintiff was registered on 11th February, 1994 and incorporated on 15th February, 1996. He told the Court that the plaintiff was operating from Woodlands

Extension Plot 7787. The witness further stated that there were two Yugoslavs who were also directors in the plaintiff company.

That was the close of the plaintiff's case.

The defendant's witness (**DW1**) was **Christy Chitalu Lumpa** one of the joint liquidators of the defendant company. DW1 testified that the defendant company was liquidated on 12th January, 1995 and one Mr Rogers Sombe was appointed as a liquidator up to 28th October, 1996 when he resigned. Thereafter DW1, Imasiku Kalaluka and Mr Clement Mabutwe (the late) were appointed liquidators. The said liquidators took up office on 31st October, 1996 and on 7th November, 1996 they were served with Court process by the plaintiff seeking vacant possession of the two properties they had bought from the previous liquidator.

DW1 went on to testify that because there was no proper handover from the previous liquidator it took them a while to understand the stage of the liquidation. They made inquiries from the sitting tenants and the law firm representing the defendant and discovered that two properties that is subdivision 4 and 5 of farm No.110a Villa Elizabetha which had two houses on each property had been sold to the plaintiff company. The joint liquidators also discovered that the sitting tenants had been given first right of refusal to purchase the properties by way of an offer made to them on 26th January, 1996 as shown on page 1, 2, 5, 6, 11 and 12 of the interveners' bundle of documents. That the offers made to the interveners had a validity of 21 days and

the sitting tenants all accepted the offers before the validity period expired as shown by the letters on page 3 and 10 of the interveners' bundle of documents.

That despite the acceptance of the offers by the sitting tenants within the validity period, the previous liquidator accepted an offer from the plaintiff at the same price of K144,000,000 on 20th February, 1996. DW1 testified that Mr Sombe (the previous liquidator) upon accepting the offer from the plaintiff received a payment of K90,000,000 on 9th April, which was duly receipted. That a contract of sale was executed on 22nd May, 1996 as shown on page 33 of the plaintiff's supplementary bundle of documents dated 22nd June, 2006. The witness stated that in this contract there was another property included that is subdivision 67 of farm No. 284a. DW1 went on to testify that the balance of K54,000,000 seems not to have been remitted to the defendant. The witness said that even though the law firm of Musonda and company said they had sent the money to the liquidator, no evidence of this has been found as there is no receipt which was issued.

In cross-examination, DW1 informed the Court that he was not there as the liquidator of the defendant when the contracts were being signed with the plaintiff. He stated that the contracts were drawn following the payment of 60% of the purchase price by the plaintiff.

When the witness was referred to page 1 of the intervener's bundle of documents, dated 12th November, 2003, he told the Court that there was no provision in the letter of offer for a counter offer.

When referred to page 3 of the intervener's bundle of documents, he informed the Court that the purported acceptance letter from the interveners varied the terms in the offer letter that were given to the interveners.

DW1 told the Court that M. Musonda and Company had represented both the plaintiff and the defendant in the transaction. He also confirmed that upon inquiry with M. Musonda and Company they were advised that the balance of K54,000,000 was remitted to the defendant.

When referred to the letter enclosing the cheque of K54,000,000, he informed the Court that the payment reflecting in the document was the full payment of the purchase price.

DW1 further stated that the details of the properties were subdivisions 4 and 5 of farm 110a, Villa Elizabetha and that the two subdivisions had two houses each meaning there were four houses in total.

That was the close of the defence.

The intervener's witness was **London Ngoma (IW1)** who testified that he had been employed by the defendant as a Planning and Systems Manager based in Lusaka. He narrated that the defendant underwent liquidation in 1995 and at that time he was residing at Plot 5a/110a, Villa Elizabetha, which was an institutional house. He stated that the named interveners and himself were offered the institutional houses by Mr Sombe, the liquidator at that time, and were given 21 days within which to respond to the offer. They accepted the offer and proposed that they would pay 10% of the purchase price as first instalment and proceeded to pay that amount to the estate manager. He stated that they were not aware that the original offers were no longer valid and that another offer had been made to the plaintiff. He said the guidelines of the sale provided that the houses would only be advertised to the public if the tenants failed to purchase. He told the Court that the interveners were not refunded the amount they paid to the estate manager when the offer was withdrawn. He prayed for a declaration that the interveners were the ones entitled to purchase the houses as sitting tenants.

During cross-examination, IW1 informed the Court that there was a letter confirming the appointment of S.P Mulenga and Associates as agents for the liquidators which was not before the Court. But when pressed further the witness conceded that there was no specific reference that S.P Mulenga and Associates were appointed as agents for the defendant in the offer letters that the interveners were given.

When referred to page 7 of the intervener's bundle of documents which was a letter from IW1's lawyers to the liquidator, he told the Court that the letter was a counter offer. IW1 conceded that he was varying the initial offer by the liquidator from K35, 000 to K30, 000 that was written by his lawyers on his behalf the letter dated 23rd February, 1996.

When IW1 was referred to the letters that were written by the other interveners he confirmed that there were new terms and conditions that were introduced to the original offer.

When asked if he or the other interveners paid the full purchase price, he told the Court he had not paid the full purchase price and that he had just paid the 10% to S.P Mulenga.

IW1 failed to produce any evidence before Court to show that the defendant had at the material time of the sale to the plaintiff appointed S.P Mulenga as their agents.

The witness was referred to page 4 of the interveners' supplementary bundle of documents filed into Court on 18th April, 2006 which was a letter from the new liquidators and he confirmed that in paragraph B the interveners had made counter offers when they were given the first option to purchase the properties.

When asked whether the interveners had claimed for fraud or mistake in relation to the title deeds held by the plaintiff in their defence, he told the Court that they had not done so.

At the close of the case all the parties filed written submissions, for which I am greatly indebted.

From the evidence led before Court I have found as facts the following:-

1. It is common cause that the defendant company was placed under liquidation on 12th January, 1995 and one Mr Rogers Sombe was appointed liquidator to dispose off the company assets.
2. It is also common cause that amongst the company assets being disposed off were the four houses on subdivision 4 and 5 of farm 110a, Villa Elizabetha situated in Lusaka.
3. I find that the interveners as sittings tenants of the afore mentioned properties were given the first option to purchase the houses by the liquidator through offer letters dated 26th January, 1996.
4. I equally find that S.P Mulenga and Associates whom the interveners were dealing with were never authorised by the liquidator to sell the properties on behalf of the defendant.
5. It is my further finding that on 20th February, 1996 the liquidator accepted an offer to purchase the said properties at the price of K144,000,000 from the plaintiff.
6. It is common ground that the full purchase price was paid by the plaintiff through the liquidator and the law firm M. Musonda and Company being the advocates for both the plaintiff and the defendants in the conveyancing transaction.
7. That upon the contract of sale being executed on 22nd May, 1996 the plaintiff was issued with the certificates of title for the purchased property.

Having carefully considered the evidence in this case the main issues to be resolved by this Court are as follows:-

1. Whether the interveners have any interest in the subject properties.
2. Whether the plaintiff is the bonafide purchaser for value of the said properties.
3. Whether the plaintiff is entitled to mesne profits and that the interveners should pay standard rentals.

The upshot of Mr S. Chisenga's submissions and arguments on behalf of the plaintiff was this: the interveners were accorded the first option to purchase the houses they occupied by way of offer letters dated 26th January, 1996. He further asserted that it was however apparent from the record that when responding to the offer letters the interveners varied the terms of the offers and thereby made counter offers. Counsel spiritedly argued that if an acceptance sought to qualify or vary the offer, then it constituted a counter offer and is rendered ineffective as an acceptance and rejects the original offer. In support of his proposition Mr Chisenga cited the case of **Galunia Farms Limited v National Milling Company Limited**¹ where it was held that:-

“If the acceptance varies the terms of the offer it is a counter offer and not acceptance of the original offer”

Mr Chisenga went on to state that the purported letters of acceptance by the interveners constituted counter offers and effectively nullified and rejected the original offer by the liquidator. He contended that the interveners by way of their

own counter offers therefore had no right and could not compel the liquidator to sell the properties to them. Counsel asserted that in light of the foregoing, the interveners have no interest in the property in contention. He also stated that the interveners did not possess any enforceable interest to justify the registration of the caveat on the property. Mr Chisanga sought the indulgence of the Court to order for the caveat on the properties to be discharged and the intervener to vacate the properties.

Mr. F.N Chani for the defendant on the other hand submitted that in 1996 the government of the day decided to sell to sitting tenants institutional houses belonging to government and parastatals, which were not ancillary to the operations of the institution concerned. The defendant being a government parastatal also sold its housing stock to the sitting tenants. Mr Chani further submitted that the interveners were sitting tenants of stands 4 and 5 of farm 110a Villa Elizabetha as well as former employees of the defendant company. Therefore they met the criteria asset for one to qualify to buy a government house as stated in the case of **Frank Machupa & Others v Tanzania-Zambia Railways Authority**².

It was Mr Chani's assertion that the interveners were given the first right of refusal to purchase the properties by way of offer letters dated 26th January, 1996. The offer to the plaintiff to purchase the property in issue was made on 16th February, 1996 and as at that date the offers by the interveners had not been rejected by the former liquidator. Counsel submitted that the

interveners being sitting tenants, former employees and intending purchasers of the subject properties were within their rights to place caveats on the said properties.

On behalf of the interveners, Mr DK Kasote also restated the submissions by Mr Chani with regard to his clients' interest in the property in issue. I have considered the arguments and authorities by counsel. My initial observation is that a perusal of the interveners purported letters of acceptance exhibited in their bundle of documents dated 18th April, 2006 reveal that their purported acceptance were counter offers because they sought to introduce new terms. It is a well settled legal principle of contract that offers automatically terminate where the offeree makes a counter offer. In **Neale v Merret**³ the Court held that there was no valid acceptance of an offer to sell property when the plaintiff introduced terms relating to payment by instalments. Similarly in **Hyde v Wrench**⁴ the defendant offered the plaintiff his property for £1000 who countered with an offer of £950 before purporting to accept the original offer. The Court held that the counter offer had terminated the offer which could no longer be accepted.

In the matter before me it is my holding that the interveners have no interest in the subject property. This is so because their purported letters of acceptance were invalid as they constituted counter offers. By qualifying or varying the terms of the offer, the interveners rejected the liquidator's original offer.

This brings me to the next aspect of the case as relates to whether the plaintiff was the bonafide purchaser of the property in contention.

It was canvassed on behalf of the plaintiff that as holder of the certificate of titles for the properties in question, the plaintiff was the legal and beneficial owner. In support of his submission Mr Chisenga sought to rely on *Section 33 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia* which is couched in the following terms:-

“A certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject any to such encumbrances liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever.

In addition, counsel cited the case of **Anti-Corruption Commission v Barnnet Development Corporation Limited**⁵ where the Supreme Court held that:-

“Under Section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by a holder of a certificate of title. However, under Section 34 of

the same Act, a certificate of title can be challenged and cancelled for fraud or reasons for impropriety in its acquisition.”

Mr Chisenga further alerted the Court to the authority of **Corpus Legal Practitioners v Mwanandani Holdings Limited**⁶ wherein it was held that:-

“We further take the view that a person alleging fraud or any other impropriety, with regard to the issuance of a Certificate of Title, must challenge the same through a Court action and prove the allegations of fraud or other impropriety, as the case may be, to obtain a Court order for the cancellation of the affected Certificate of Title by the Registrar of Lands and Deeds.”

It was also Mr Chisenga's submission that in the case of **Mpongwe Development Corporation Limited v Francis Kamanda and 51 Others**⁷ the Supreme Court found that the trial Judge could not order cancellation of title were there is no evidence that the land was acquired fraudulently or were a party has not specifically pleaded fraud. Mr Chisenga also went on to submit that from the evidence adduced before Court the defendant or the interveners did not specifically allege fraud in relation to the issuance of the certificate of titles held by the plaintiff. He urged this Court to declare the plaintiff as the legal and beneficial owner of subdivisions 4 and 5 of farm 110a.

The foregoing were powerful arguments with much force and merit in them. In response to the plaintiff's submissions Mr Chani and Mr Kasote on behalf of the defendant and the interveners respectively, basically argued that the manner in

which the plaintiff acquired the certificates of title for the properties was questionable as the vendors of the said property never received the balance of the purchase price. The Court's attention was drawn to the case of **Ndongo v Moses Mulyongo and Roostico Banda**⁸ where the Supreme Court held *inter alia* that:-

“A contract of sale of land does not per se transfer ownership of land to the buyer. And a mere payment of a deposit towards the purchase price does not transfer ownership to the buyer. Much more is required.”

Counsel reiterated that in a contract of sale of land all the obligations have to be fulfilled by the buyer and until then the property in question remained for the vendor. According to Mr Chani and Mr Kasote, the plaintiff had not fulfilled its contractual obligation as the balance of the purchase price had never been remitted to the defendant. It was counsel's further assertion that even though there was no plea of fraud by the defendant with regard to the plaintiff's acquisition of title, the offer to the plaintiff to purchase the properties was erroneous because the earlier offers to the sitting tenants had not been rescinded or rejected. The case of **Lusaka City Council, National Airports Corporation v Grace Mwamba and 4 Others**⁹ was called to aid wherein the Supreme Court ordered the withdrawal of offers which were erroneously given and the cancellation of any certificates of title issued. Similarly in the matter before me, counsel sought the indulgence of the Court to order the same.

Quite clearly the documentary evidence produced in the matter before me show that when the defendant company was placed under liquidation one Rodgers Sombe was appointed as the official liquidator. I take the view that it was only the liquidator Mr Rogers Sombe, who possessed the legal authority in keeping with *Section 289 of the Companies Act* to sell the property on behalf of the defendant.

Given that there was no valid acceptance by the interveners as already alluded to above, the liquidator was not impeded to offer to sell the properties to the plaintiff. It is my observation that the plaintiff was an innocent purchaser for value of the properties in question at K144,000,000. I therefore find the argument by the defendant and interveners that the property in question remained that of the vendor as the balance of the purchase price in the sum of K54,000,000 was not remitted to the defendant to be misconceived and baseless. I say so because firstly, there is documentary evidence at page 31 of the plaintiff's supplementary bundle of documents confirming that the plaintiff was on 2nd August, 1996 advised to pay the balance of the purchase price through M. Musonda and Company the firm that represented both the plaintiff and defendant in the conveyancing transaction. Secondly, the letter produced on page 6 of the plaintiff's further supplementary bundle of documents clearly shows that on 18th September, 1996 the plaintiff duly remitted the final payment of K54,000,000 through M. Musonda and Company which was acknowledged by Mr D. Bukali one of the firm's partners. Lastly, on page 29 of the plaintiff's supplementary bundle of documents

the official liquidator Mr Rodgers Sombe confirmed to the Commissioner of Lands on 2nd October, 2016 that the property in issue was duly sold to the plaintiff and sought to be granted the consent to assign. I have no doubt therefore that all the contractual obligations were fulfilled by the plaintiff and that proper transfer of the title for the properties herein was conveyed by the liquidator.

It is my affirmation that the plaintiff was a bonafide purchaser for value who obtained good title for the properties. I am also satisfied that the principle elucidated in the case of Lusaka City Council, National Airports Corporation v Grace Mwamba and 4 others is not applicable to the matter before me.

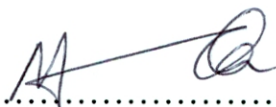
Having established that the property herein was legally sold to the plaintiff, it goes without saying that they are entitled to mesne profits. I agree with the learned authors of **Halsbury's Laws of England 5th Edition Volume 62 at paragraph 279** when they indicate that the landlord may recover in a claim for mesne profits, the damages which he has suffered through being out of possession of the land or if he can prove no actual damage caused by him by the defendant's trespass, the landlord may recover as mesne profits the value of the premises to the defendant for the period of the defendant's wrongful occupation. In most cases, the rent paid under any expired tenancy is strong evidence as to the open market value. Mesne profits, being a type of damages for trespass, may be recovered in respect of the defendant's continued occupation only after the expiry of his legal

right to occupy the premises. The landlord is not limited to a claim for the profits which the defendant has received from the land or those which he himself has lost.

In sum, I order that the interveners should pay standard rent to the plaintiff for the period that they have been in possession of the properties. The assessment of such standard rent is referred to the Deputy Registrar. The interveners are given one month grace period in which to vacate the properties. Interest at the bank lending rate is awarded to the plaintiff on the standard rent, to be determined from the date of the writ to the date of payment. The costs follow the event and will be borne by the defendant and the interveners.

Leave to appeal is granted.

Dated at Lusaka this 14TH day of MARCH , 2017



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M. CHANDA
JUDGE